

Respondent and its insurance carrier contend the Judge erred. They contend (1) claimant did not injure her neck or back working for the respondent; (2) claimant's task loss is only 33 percent based upon Dr. Trimble's testimony; (3) claimant failed to make a good faith effort to find appropriate employment after recovering from her injuries and, therefore,

a wage should be imputed leaving her a 35 percent wage loss for that prong of the permanent partial disability formula; and (4) averaging those percentages, claimant's permanent partial general disability is no more than 34 percent.

Conversely, claimant requests the Board to affirm the Award.

The only issue before the Board on this appeal is:

What is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. Ms. Williamson injured both arms and developed bilateral carpal tunnel syndrome, cervical paraspinous myofascitis, bilateral lesser occipital nerve entrapment syndrome, adhesive capsulitis in both shoulders, and de Quervain's syndrome working for DewEze, Inc., between August 1995 and her last day working there on or about March 7, 1996. Ms. Williamson's job required her to install hydraulic hoses on tractors and do other tasks that also required the forceful and repetitive use of her hands and arms.
2. After initially seeing a doctor in Harper and a doctor in Anthony, the company then referred Ms. Williamson to Wichita surgeon Dr. Tyrone D. Artz.
3. In May 1996, Dr. Artz operated on Ms. Williamson's right hand and wrist and did a right carpal tunnel release. In August 1996, the doctor did a left carpal tunnel release and de Quervain's surgery on that same hand. In January 1997, the doctor did an arthrogram to determine if Ms. Williamson had a torn rotator cuff. That same month, the doctor manipulated Ms. Williamson's right shoulder while she was under anesthesia to break the adhesions that had formed. In February 1997, the doctor excised scar tissue from the right fourth metacarpophalangeal joint.
4. In September 1997, Dr. Artz referred Ms. Williamson to Dr. Donald T. Trimble, one of the other doctor's in Dr. Artz's clinic. Dr. Trimble treated Ms. Williamson's neck and low back with a TENS unit and physical therapy.
5. As a result of the injuries that Ms. Williamson sustained working for DewEze, the Board finds that she now has a 39 percent whole body functional impairment. That finding is based upon the opinions of Dr. Daniel D. Zimmerman who examined Ms. Williamson in May 1998 and whom the Board finds more persuasive than Dr. Donald T. Trimble whose opinions are somewhat confusing and contradictory.
6. The symptoms that Ms. Williamson is experiencing in her neck and shoulders are directly related to and caused by the injuries to both arms. Both doctors Trimble and

Zimmerman seem to agree that the shoulder problems are directly and naturally related to the carpal tunnel syndrome. The doctors seem to agree that the carpal tunnel syndrome caused Ms. Williamson to use her upper extremities in a different manner, which caused the injury. Although Dr. Trimble is reluctant to say that the neck was also affected in such a manner, Dr. Zimmerman believes the same phenomenon occurred in the neck.

7. Ms. Williamson has failed to prove that her symptoms in her low back are either related to her work at DewEze or that they are a natural consequence of her work-related injuries.

8. Vocational rehabilitation counselor Karen Crist Terrill met with Ms. Williamson to devise a list of her former job tasks. Ms. Terrill created a list of 9 job tasks that Ms. Williamson had performed in the 15 year period before she injured herself at DewEze.

9. Because of the injuries that she sustained working for DewEze, Ms. Williamson can no longer perform 7 of 9, or 78 percent, of her former job tasks. That finding is supported by Dr. Zimmerman's testimony and opinions. The Board agrees with the Judge's conclusion that Dr. Trimble's task analysis "is almost incomprehensible and is inconsistent".

10. Ms. Williamson last saw Dr. Trimble on April 16, 1998. After receiving her medical release to return to work, Ms. Williamson went to DewEze to ask about returning. In July 1998, DewEze wrote and advised Ms. Williamson that it could not offer her a job. When she testified at the regular hearing in August 1998, Ms. Williamson's job search consisted of talking with a nurse about doing home care and looking in newspapers at the help wanted ads.

11. Since being released to return to work, Ms. Williamson has neither submitted nor completed any job applications. Also, she has been reluctant to talk with potential employers in her hometown of Harper or neighboring Anthony as she is afraid her son would be ridiculed if others learn that she has difficulty with math, reading, and writing. Although she believes there are some jobs that she could do such as cooking, she has not contacted any potential employers.

12. Ms. Williamson has not completed high school as she dropped out after completing the eleventh grade and she has not obtained a GED. Although her injuries are limiting, the Board is not persuaded that only one actual contact or job inquiry constitutes a good faith effort to find employment.

13. Despite her injuries, Ms. Williamson retains the ability to earn between \$5.15 and \$6.00 per hour as indicated by Ms. Terrill.

CONCLUSIONS OF LAW

1. The Board affirms the Judge's finding that the appropriate date of accident for this series of accidents and repetitive mini-traumas should be Ms. Williamson's last day of work at DewEze on or about March 7, 1996. Further, the parties did not contest that finding either in their briefs or at oral argument to the Board.

2. Because hers is an "unscheduled" injury, Ms. Williamson's entitlement to permanent partial general disability benefits is governed by K.S.A. 44-510e. That statute provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk¹ and Copeland.² In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that paid a comparable wage that the employer had offered. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wage would be based upon ability rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the injury.

3. As indicated above, Ms. Williamson has failed to prove that she has made a good faith effort to find appropriate employment. Therefore, a post-injury wage should be imputed for the wage loss prong of the permanent partial general disability formula. The Board concludes that Ms. Williamson retains the ability to earn \$5.50 per hour or \$220 per week. Comparing that wage to \$410.16, the stipulated average weekly wage at the time

¹ Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

² Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

of the injury, there is a 46 percent difference in Ms. Williamson's pre- and post-injury wages.

4. As required by the permanent partial general disability formula, the 78 percent task loss is averaged with the 46 percent wage loss resulting in a 62 percent permanent partial general disability.

AWARD

WHEREFORE, the Board modifies the November 13, 1998 Award to reduce the permanent partial general disability from 89 percent to 62 percent.

Wanda I. Williamson is granted compensation from DewEze, Inc. for a March 7, 1996 accident and the resulting 62% permanent partial general disability. Ms. Williamson is entitled to receive 88.97 weeks temporary total disability at the rate of \$273.45, or \$24,328.85, followed by 211.44 weeks of permanent partial disability benefits at \$273.45 per week, or \$57,818.27, for a total award of \$82,147.12.

As of July 1, 1999, there is due and owing to Ms. Williamson \$47,306.85 less any amounts previously paid. The balance of \$34,840.27 is to be paid at the weekly rate of \$273.45 until paid in full or further order.

The Appeals Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of June 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Andrew E. Busch, Wichita, KS
Douglas D. Johnson, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director